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To: Microsoft ATR
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Subject: Microsoft Settlement

There is still plenty to complain about in the text of the proposed settlement, itself.

Those who followed the case closely will remember that one of Microsoft's chief claims during the trial was that times and the nature of business have changed, and that anti-trust enforcement ought to be different today than it was when the laws were first passed in the early part of the last century. This is a fast-moving industry based on intellectual, rather than industrial, capital, goes the argument. Sure, Microsoft is on top today (and every day since it got bigger than Lotus around 1986) but, hey, that could change in a Redmond minute. This argument evidently didn't resonate with the court, though, since Microsoft was found guilty. Keep repeating to yourself: "Microsoft is guilty."

Well, Microsoft now appears to be exacting its revenge, leaning this time on the same letter of the old law to not only get a better deal, but literally to disenfranchise many of the people and organizations who feel they have been damaged by Microsoft's actions. If this deal goes through as it is written, Microsoft will emerge from the case not just unscathed, but stronger than before.

Here is what I mean. The remedies in the Proposed Final Judgment specifically protect companies in commerce -- organizations in business for profit. On the surface, that makes sense because Microsoft was found guilty of monopolistic activities against "competing" commercial software vendors like Netscape, and other commercial vendors -- computer vendors like Compaq, for example. The Department of Justice is used to working in this kind of economic world, and has done a fair job of crafting a remedy that will rein in Microsoft without causing undue harm to the rest of the commercial portion of the industry. But Microsoft's greatest single threat on the operating system front comes from Linux -- a non-commercial product -- and it faces a growing threat on the applications front from Open Source and freeware applications.

The biggest competitor to Microsoft Internet Information Server is Apache, which comes from the Apache Foundation, a not-for-profit. Apache practically rules the Net, along with Sendmail, and Perl, both of which also come from non-profits. Yet not-for-profit organizations have no rights at all under the proposed settlement. It is as though they don't even exist.

Section III(J)(2) contains some very strong language against not-for-profits. Specifically, the language says that it need not describe nor license API, Documentation, or Communications Protocols affecting authentication and authorization to companies that don't meet Microsoft's

criteria as a business: "...(c) meets reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business, ..."

So much for SAMBA and other Open Source projects that use Microsoft calls. The settlement gives Microsoft the right to effectively kill these products.

Section III(D) takes this disturbing trend even further. It deals with disclosure of information regarding the APIs for incorporating non-Microsoft "middleware." In this section, Microsoft discloses to Independent Software Vendors (ISVs), Independent Hardware Vendors (IHVs), Internet Access Providers (IAPs), Internet Content Providers (ICPs), and Original Equipment Manufacturers (OEMs) the information needed to inter-operate with Windows at this level. Yet, when we look in the footnotes at the legal definitions for these outfits, we find the definitions specify commercial concerns only.

But wait, there's more! Under this deal, the government is shut out, too. NASA, the national laboratories, the military, the National Institute of Standards and Technology -- even the Department of Justice itself -- have no rights. It is a good thing Afghanistan is such a low-tech adversary and that B-52s don't run Windows.

I know, I know. The government buys commercial software and uses contractors who make profits. Open Source software is sold for profit by outfits like Red Hat. It is easy to argue that I am being a bit shrill here. But I know the way Microsoft thinks. They probably saw this one coming months ago and have been falling all over themselves hoping to get it through. If this language gets through, MICROSOFT WILL FIND A WAY TO TAKE ADVANTAGE OF IT.

Is the Department of Justice really that stupid? Yes and no. They showed through the case little understanding of how the software business really functions. But they are also complying with the law which, as Microsoft argued, may not be quite in sync with the market realities of today. In the days of Roosevelt and Taft, when these laws were first being enforced, the idea that truly free products could become a major force in any industry -- well, it just would have seemed insane.